

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
:
ANTHONY CHARLOT, et al., :
:
Plaintiff, : 12-CV-4543 (KAM) (VMS)
:
September 10, 2013
:
V. : Brooklyn, New York
:
ECOLAB, INC., :
:
Defendant. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: MICHAEL SWEENEY, ESQ.
ARTEMIO GUERRA, ESQ.
MOLLY BROOKS, ESQ.

For the Defendant: SHIRLEY LERNER, ESQ.
ANDREW VOSS, ESQ.
SUSAN SITZKE, ESQ.
JEFFREY BRECHER, ESQ.

Court Transcriber: ARIA SERVICES, INC.
c/o Elizabeth Barron
102 Sparrow Ridge Road
Carmel, NY 10512
(845) 260-1377

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE COURT: Charlot v. Ecolab, 12-CV-4543.
2 For plaintiff?

3 MR. SWEENEY: Mike Sweeney of Getman &
4 Sweeney for plaintiffs.

5 MR. GUERRA: Artemio Guerra, Getman &
6 Sweeney, for plaintiffs.

7 MS. BROOKS: This is Molly Brooks from
8 Outten & Golden, for plaintiffs.

9 MS. LERNER: For Ecolab, we have Littler
10 Mendelson and Jackson Lewis on the call. From Littler
11 Mendelson, it's Shirley Lerner, Andrew Voss, Susan
12 Sitzke.

13 THE COURT: So I heard Andrew Voss. Who
14 else?

15 MS. LERNER: Shirley Lerner.

16 THE COURT: Okay.

17 MS. LERNER: Also Susan Sitzke.

18 THE COURT: Susan -- and how do you spell
19 the last name?

20 MS. LERNER: S-i-t-z-k-e.

21 THE COURT: Okay.

22 MS. LERNER: And then from Jackson Lewis,
23 who also represents Ecolab, is Jeff Brecher.

24 THE COURT: Okay.

25 MR. BRECHER: Good morning, your Honor.

1 THE COURT: Good morning. So this is really
2 a status conference for you to let me know what's going
3 on in the case. So who wants to go first?

4 MR. SWEENEY: This is Mike Sweeney for the
5 plaintiffs, your Honor.

6 THE COURT: I'm sorry, I have a new old
7 phone and I've turned the volume up as high as I can
8 but it's hard to hear, so if you don't mind projecting.

9 MR. SWEENEY: I'll speak up. How's this?

10 THE COURT: That's better, thank you.

11 MR. SWEENEY: Okay. Your Honor, just to
12 give you some background, this is a case about whether
13 certain Ecolab employees, the route managers, are mis-
14 classified employees.

15 THE COURT: Yes.

16 MR. SWEENEY: Although the case was pled as
17 a Fair Labor Standards Act collective action and a Rule
18 23 class action in New York and New Jersey, the parties
19 stipulated to a case management plan that allows for
20 summary judgment motions on Ecolab's two defenses to
21 mis-classification just for the three names plaintiffs,
22 Charlot, Remache and Tejada. We agreed to do that on
23 an expedited basis, and the agreement was that once
24 those issues were resolved, the parties would be able
25 to address certification issues, if appropriate.

1 The parties amended the case management plan
2 once and currently, discovery is due to be completed by
3 October 1st. So far, the parties have completed initial
4 written discovery; they have both propounded and
5 answered. Ecolab has taken the deposition of each of
6 the three plaintiffs.

7 THE COURT: Okay.

8 MR. SWEENEY: And plaintiffs have conducted
9 (ui) depositions.

10 THE COURT: I'm sorry, I think the phone
11 problem is really on my end. So paper discovery, three
12 plaintiff depositions and?

13 MR. SWEENEY: The 30(b)(6) deposition of the
14 defendant.

15 THE COURT: Okay.

16 MR. SWEENEY: There's still some issues
17 outstanding with respect to discovery from the initial
18 request, but both parties have issued post-deposition
19 discovery, I think in the hope of kind of narrowing the
20 outstanding discovery. Plaintiffs will respond by the
21 deadline of October 1st and produce any relevant
22 materials. Defendant's response is due on October 1st
23 as well. Plaintiffs have requested that defendants
24 raise any objections to the discovery before October
25 1st, so we can try to work out any issues and actually

1 receive the discovery when it's due on the 1st.

2 THE COURT: Right.

3 MR. SWEENEY: In a telephone conversation
4 yesterday, defense counsel Ms. Lerner indicated that
5 she would consider the request but was not able to give
6 an answer by today.

7 The last outstanding piece of this is expert
8 discovery. And under the case management plan, expert
9 discovery is to be completed by October 1st. Defendants
10 identified two experts on September 5th, which was
11 consistent with the amended case management plan.
12 Under the plan, the reports are due on September 15th.
13 Given that the 15th is a Sunday, plaintiffs are willing
14 to receive those reports by noon on September 16th, the
15 Monday.

16 THE COURT: Okay.

17 MR. SWEENEY: And then defendants have made
18 the experts available for deposition on September 26th
19 in San Francisco and October 4th in Houston, Texas, for
20 the two plaintiffs who work in New York and one in
21 Pennsylvania and New Jersey. Nevertheless, plaintiffs
22 have agreed to those dates.

23 THE COURT: And also in those cities.

24 MR. SWEENEY: We have agreed that we'll
25 either taken them in person in the cities or defendants

1 have kindly offered to set up video conferencing, so we
2 may well do it by video conference.

3 THE COURT: Okay.

4 MR. SWEENEY: I think that's where we stand.

5 THE COURT: So it seems that the only thing
6 that might be a bit of a hiccup on your current
7 schedule is if there's a problem -- basically, the
8 question that was asked, if folks could identify the
9 objections before the October 1st deadline, right,
10 because if you find out on October 1st there's a
11 problem, then what's the proposal for what will happen
12 then?

13 MS. LERNER: Your Honor, if I could just
14 address a couple of points. I think Mr. Sweeney for
15 the most part accurately set forth where we're at in
16 terms of discovery here, except a couple of small
17 points. In terms of us asking us to identify
18 objections prior to October 1st, there is also
19 outstanding discovery from Ecolab to the plaintiffs.
20 If there's any expectation that we're going to identify
21 our objections prior to October 1st, I would say that
22 that should of course be for both parties.

23 But more importantly, I frankly think it's
24 unworkable. I've looked over -- after receiving Mr.
25 Sweeney's request yesterday to have early objections,

1 went more carefully over the written discovery, and it
2 is extraordinarily burdensome and complicated. And the
3 idea that I would be able to provide objections and
4 that we would have them worked out and answers provided
5 in the next twenty days, I don't honestly think is
6 workable.

7 So I would suggest that we perhaps follow
8 the ordinary course, which is both sides will provide
9 their objections and responses by October 1st, as
10 provided for under the rules, and then both parties
11 will determine whether they're going to accept those
12 objections or whether they're going to try and work out
13 a compromise, and then whether motion practice is
14 necessary to work out those disputes. I don't believe
15 that we'll be able to expedite beyond that.

16 Also, I do want to point out that Mr.
17 Sweeney noted that the experts' reports are due by noon
18 on the 16th. I do not in fact believe that's accurate.
19 The parties entered into a stipulated case management -
20 - amended case management plan to have the reports due
21 on September 15th, which is Sunday. And it is my
22 understanding from the rules that that then makes the
23 reports due by end of the day on the 16th, not by noon.
24 We will of course do everything we can to have those
25 reports provided as soon as possible but we're already

1 on a very expedited schedule and to expect us to have
2 them by noon on the 16th is not necessarily realistic,
3 nor is it required under the rules.

4 MR. SWEENEY: Your Honor, may I respond?
5 This is Mike Sweeney.

6 THE COURT: Yes.

7 MR. SWEENEY: With respect to identifying
8 the objections, I appreciate what Ms. Leaner said,
9 although the discovery that's out there is discovery
10 that is post-deposition discovery, and plaintiffs
11 clearly made an effort in that discovery to try and
12 narrow the previous request to address Ecolab's
13 objections. There may well be additional objections
14 but I can't imagine they don't know what they are. The
15 discovery is not something that -- most of it, that we
16 haven't asked for before.

17 And by getting the objections out front, it
18 just makes the process move quicker. There's no reason
19 certainly to wait until October 1st. That's just going
20 to slow the case down. Plaintiffs are happy to raise
21 any objections we have with respect to the discovery
22 that they propounded shortly, by the end of the week.

23 MS. LERNER: I do not have --

24 THE COURT: I can only hear one person at a
25 time, so are you finished, Mr. Sweeney? Go ahead.

1 MR. SWEENEY: I wasn't finished with all the
2 points but perhaps let me just address the other two.
3 With respect to the 16th, we'll be deposing the person
4 ten days later but we're fine getting the report at the
5 end of the day on the 16th, so I can take that issue off
6 the table.

7 The one other issue that I would raise is
8 that we have asked the defendants to expedite written
9 discovery on the experts. We intend to have that
10 written discovery to them by tomorrow. Given that we
11 have the depositions set for the 26th, we'd like that
12 discovery expedite, to insure that we have all the
13 discovery necessary to make the depositions effective.

14 THE COURT: I'm sorry, I lost you on that.
15 You want written discovery related to the expert
16 expedite?

17 MR. SWEENEY: Yeah. You know, it's fairly
18 basic discovery with the experts.

19 THE COURT: Okay.

20 MR. SWEENEY: We have to depose them on the
21 26th and the 4th. We'll propound written discovery
22 tomorrow. We'd like to have expedited responses to
23 that, just to make sure that we have the information
24 for the depositions.

25 MS. LERNER: Your Honor, if I could respond.

1 I am actually taken aback a little bit by the idea that
2 we're now going to get a third set of discovery that
3 won't be due under the rules until about two weeks
4 after the agreed-upon close of discovery. And not only
5 -- any discovery should have been served by thirty days
6 before October 1st. So I don't know what basis there is
7 for propounding a third set of discovery tomorrow. And
8 certainly I cannot waive my client's right to take a
9 reasonable amount of time to respond to that written
10 discovery.

11 THE COURT: All right.

12 MS. LERNER: Similarly, I have no authority
13 to waive my client's right to the reasonable amount of
14 time provided for under the rules to provide objections
15 to the second set of written discovery.

16 THE COURT: Let's talk about -- what is the
17 expert -- what kind of discovery are we talking about
18 for these experts?

19 MR. SWEENEY: It's going to be fairly
20 straightforward discovery. We're going to want to know
21 where they testified before.

22 THE COURT: Why isn't this included in the
23 report? Isn't this the kind of disclosure that you
24 should get anyway? So why is it under the rubric of
25 discovery requests rather than the kind of information

1 that should be included in a report?

2 MR. SWEENEY: The amount of fees -- we've
3 seen his report before. It doesn't include all the
4 discovery that we would want. It's not a lot. Going
5 back, Ms. Lerner's question as to why we didn't
6 propound this thirty days ago -- the reason is, they
7 didn't identify the witnesses until last Thursday, so
8 we could not. It was impossible to have propounded it
9 thirty days ago.

10 But it's going to be expert discovery. It's
11 not a new set of discovery going to the class in any
12 way. We're just trying to get fair information with
13 respect to the expert, so that we can conduct an
14 effective deposition.

15 THE COURT: From the defendants, I don't
16 really understand the objection, given what Mr. Sweeney
17 said, which seems to be consistent -- you agree, you
18 just told them about who the expert is, so how were
19 they supposed to do something before that? It's hard
20 to talk about this in the abstract.

21 It seems plaintiffs should issue whatever
22 your request is this information and to the extent it's
23 reasonable, defendants should respond so that they can
24 have these depositions done in a timely way. I don't
25 know what's unusual, from the two things he's mentioned

1 about it, so it's not something that anyone should have
2 to sit around to think about all that much. If you
3 have it, provide it. If you don't have it, don't
4 provide it, but do it before the depositions.

5 Let's go back to what seems to be the more
6 substantive question, this point about the post-
7 deposition discovery. What I heard from defendants'
8 counsel is that it's complicated and burdensome. What
9 is it? There are two issues. One is, what is it that
10 is complicated or burdensome? I'm asking that as a
11 broad question. I understand you haven't had lots of
12 time to go over it. Because that doesn't seem like
13 something that should be happening now, given what this
14 schedule is about and how focused this discovery is
15 supposed to be.

16 And the other is this timing question,
17 because if you're only objecting -- if you're objecting
18 by October 1st, that just leaves you looking at your --
19 I think it's the June 7th order or that you submitted
20 June 7th. It's not practical to get the discovery done
21 by then if there's going to need to be followup on
22 that.

23 The procedural question is, are you talking
24 about just making objections but providing everything
25 that you don't object to, or just the objections on

1 October 1st? So let's hear from defendants' counsel on
2 that.

3 MS. LERNER: I would expect to provide
4 objections on October 1st as well as responses --
5 documents that we don't object to. A great deal of the
6 requests, as I read them, and I think maybe Mr. Sweeney
7 has agreed to that, are simply I believe restating
8 questions, sometimes making them broader, sometimes
9 narrower, that were already propounded in the first set
10 of discovery.

11 Again, talking in the abstract, I don't know
12 what more of what different things he's expecting to
13 get. So I just feel like I'll be making the same
14 objections in large part that we previously made, and
15 we'll have, I believe, many of the same disputes that
16 we're going to have about the first set of written
17 discovery.

18 MR. SWEENEY: May I respond, your Honor?
19 This is Mike Sweeney.

20 THE COURT: Yes.

21 MR. SWEENEY: This may be helpful. With
22 respect to initial discovery requests, we went back and
23 forth on those. And right before the depositions, we
24 had written to defense counsel saying it hadn't
25 produced all the discovery, and we had a number of

1 calls. And in them, we agreed that we would try to
2 reduce -- we'd try to focus the discovery. Indeed, we
3 were promised a stipulation and we were promised other
4 things that would come out of the testimony.

5 So we did that. We took the testimony and
6 we took the requests that were there, but it was never
7 resolved whether or not those things should be produced
8 or not, or the objections were not resolved because
9 there was an agreement that we would try to narrow
10 them, and we stepped out and narrowed them.

11 So for instance, we'd asked for a list --
12 one of the issues here is whether or not these people
13 are outside sales people. They have -- for each other
14 people's routes, they have a lease, in which the
15 customer and the Ecolab sales person has signed them,
16 and we had asked for all those leases so that we can
17 see if indeed our clients, who they're claiming to
18 sales people, are people that signed the lease.

19 We've been told that they cannot get those
20 or they're going to check into them but they don't
21 think they can get them, they can't find them all.
22 That's fine. If they're not going to produce them --
23 we think they're relevant. If they think they can't, I
24 think it's an issue that should come to the Court.
25 It's not a new issue. It's one that they've thought

1 about or we discussed before.

2 Indeed, as Ms. Lerner just said, most of the
3 stuff, they've objected to before, and there's been an
4 effort to narrow it. If the objection is the same,
5 that's okay, but at least it gives us a basis to first
6 try to work it out quickly and if not, come to your
7 Honor and have you work out those issues that we can't
8 resolve. But there's nothing new here.

9 MS. LERNER: I don't know that there's
10 nothing new here. As I said, some of the requests are
11 actually broader and some of them are narrower, but
12 they are better defined than the first set of
13 discovery, for the most part. We have already made
14 many of the objections.

15 Quite frankly, between now and October 1st, I
16 just don't know that we're going to get meaningful
17 objections out that will expedite discovery any more so
18 than if I am allowed, as I am allowed under the rules,
19 to put in thoughtful objections and truly dig in to see
20 how much we can provide or not in response to the
21 discovery.

22 THE COURT: All right, this is what we're
23 going to do here: Since you all haven't worked through
24 this and I can't really contribute that much to this,
25 by 10/1, which is your date, you should serve --

1 whoever needs to give each other objections, do that.
2 So that's by 10/1/13. By 10/8, you need to have a meet
3 and confer. I don't care if you do it on the phone or
4 not. But you need to have your own detailed
5 conversation about what you're going to do and if you
6 can work this out.

7 Whatever is left over after that that you
8 can't work out, I want a joint letter by 10/11 that
9 tells me whatever it is that is outstanding, that you
10 object about and need to have resolved. On 10/17 at
11 11:30, we will have a telephone call to talk about
12 whatever it is that you raise in that 10/11 letter.

13 On the expert discovery point, by tomorrow,
14 which I think is what Mr. Sweeney said you could do,
15 ask for these requests for the expert documents that
16 you want, at least for the depositions happening on the
17 26th. And to the extent that counsel can respond, do it
18 by 9/19. That will give you a couple of days to look
19 at it.

20 Fight about the small things. I don't know.
21 It seems to me for expert discovery, it shouldn't be
22 anything that's unusual. And then pick your own dates
23 for whatever the October date is. I think that's the
24 Houston deposition, whatever would give you enough time
25 to make the request and then for the defendants to

1 respond.

2 Then I guess the timing question is, do you
3 want -- right now, you're working with that November 1st
4 deadline. It's only the pre-motion conference letter.
5 I'm guessing you probably already have an idea of what
6 your theory is for your motions. But do you want to
7 stick with that November 1st date or do you want me to
8 push it out two weeks?

9 MR. SWEENEY: Plaintiffs would like to stick
10 with it, your Honor.

11 THE COURT: Okay. Defendants? I mean, we
12 can revisit that question on the 17th, when we have this
13 telephone conversation, and see what it is that's going
14 to be produced, if that's relevant to anything that's
15 going to happen on the 1st or by the 1st.

16 MR. SWEENEY: Your Honor, this is Mike
17 Sweeney. Can I just make one more request? This may
18 prevent a phone call later. With respect to the
19 October 4th deposition, I'm happy to accept a reasonable
20 date from Ecolab for their production of the expert
21 discovery. I think that if we have the dates now,
22 everybody would be clearer on it and we won't need a
23 call.

24 Shirley, with respect to Dr. Ahern (ph),
25 would you be able to respond to the written discovery

1 by the 24th of September? That would give you almost
2 two weeks.

3 MS. LERNER: Mike, I don't -- I haven't seen
4 what discovery you're asking for. Assuming it's
5 standard information regarding an expert, I expect that
6 it's going to be in our report anyway, which you're
7 going to get on the 16th. Is there something more than
8 what is ordinary that you're expecting?

9 MR. SWEENEY: I haven't seen the report, so
10 I don't -- if not, it won't be a problem.

11 THE COURT: You need to work it out. It
12 doesn't make any sense to try to do this in the
13 abstract. If you can't come to an agreement, then put
14 a joint letter in about what the issue is. But, you
15 know, give me a little bit of lead time on whenever
16 your -- I guess it's the 10/4 deposition.

17 All right. So you'll see an order with
18 these dates. We'll talk to you on the 17th of October.
19 If there's some issue that comes up before that, you
20 can do -- either one put a letter in and the other can
21 respond or you can put in a joint letter, okay?

22 MR. SWEENEY: Thank you, your Honor.

23 THE COURT: All right. Thanks, everybody.

24 * * * * *

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

A handwritten signature in dark ink, appearing to read 'EB', with a long horizontal flourish extending to the right.

ELIZABETH BARRON

September 13, 2013